254, 257; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683, 697; *Douglas* v. *Kentucky*, 168 U. S. 488; *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U. S. 453.

It seems, then, that the only possible manner of distinguishing or reconciling the decisions in the two principal cases is on the theory that, though a contract of a city granting an exclusive right for a term of years is void to the extent of not barring the city from conferring a franchise to other parties, still there is left in that contract enough force and vitality to prevent the city from establishing a plant of its own. In other words, the court having held in the *Walla Walla case* that it was competent for a city by express contract to bar itself from competition, in cases involving such contracts as was considered in the *Vicksburg* and *Hutchinson cases* the court will hold invalid only that part which makes the contract exclusive, thus in effect severing it, retaining that which when standing alone has been held valid, and rejecting the remainder. But suppose this kind of contract were presented to the court: A franchise to a public service corporation, the city contracting not to grant a similar right to others, either not mentioning it at all, or expressly reserving the right to establish a municipal plant. Would not the court have to hold such contract valid? There certainly would not be present the element of exclusiveness or monopoly, the ground upon which these franchises have been held invalid. And if the court would hold such contract valid, what would their holding be in another case similar to the *Vicksburg case?* In adopting this doctrine of the severability of the contract the court has adopted a rule of construction quite contrary to the trend of previous decisions, for the tendency has been to hold that the municipality has not excluded itself. In fact, there is very respectable authority for the view that even by express contract a city cannot exclude itself, there being no question of creating a monopoly involved. ELLIOTT, MUNIC. CORPS., § 148; DILLON, MUNIC. CORPS., § 97, and cases cited.

R. W. A.

POLICE REGULATION OF SLEEPING CAR BERTHS.—From the time of the introduction of the sleeping car there has been a constant feud between the sleeping car companies and the travelling public in regard to the upper berths. The exigencies of the situation have, of course, made economy of space a prime requisite in sleeping car construction, and there is no doubt but that a high degree of success in this respect has attended the efforts of the sleeping car builders. The public has usually been tolerant enough of the close quarters assigned to it, when crowding has seemed necessary to accommodate the travellers applying for sleeping car space, but it has never been quite clear to the average traveller why he should be forced to practice the arts of the contortionist at the risk of breaking his head against the upper berth when no one occupied or wanted that upper berth. He has usually assumed that the company's regulation in regard to unoccupied upper berths has been designed to force him to buy an entire section if he wished head-room enough to make a lower berth comfortable.

This long-standing abuse, of denying to the occupant of the lower berth the space of the unoccupied upper, was sought to be corrected by the legislature of the state of Wisconsin during the session of 1907, by means of an act providing that "whenever a person pays for the use of a double lower berth in a sleeping car he shall have the right to direct whether the upper berth shall be open or closed, unless the upper berth is actually occupied by some other person." The act was entitled an act relating to the health and comfort of occupants of sleeping car berths.

The act was held unconstitutional. *State* v. *Redmon* (Wis. 1907), 114 N. W. 137. The opinion is somewhat more vague and indefinite than most opinions of that very able court, and leaves an impression upon the mind of the reader that the court felt called upon to curb the movement toward paternalism which finds expression in a constant expansion of the police power of the state, and that this case was expected to serve as a warning and an example.

The chief infirmity in the law pointed out by the court is the fact that it gives the occupant of the lower berth the option of having the upper berth open or closed as he may choose. "To thus leave such matter," says the court, "to the mere caprice of the occupant of the lower berth is a confession on the face of the act that it was not treated by the legislature as one deemed to be reasonably vital to the public interests. So the law is not, in reality, a police regulation, but an unwarranted interference with property rights."

It is not quite clear why the mere existence of the option should of itself conclusively show that the act was not designed primarily to benefit the public. The wishes of those individuals chiefly concerned frequently determine the specific effect and application of lawful legislative acts passed in pursuance of the police power. Thus, in the case of *Swift* v. *The People,* 162 Ill. 534, an ordinance of the city of Chicago prohibiting the granting of a license to keep a dram-shop within a described portion of the city unless the applicant should present a petition signed by a majority of the legal voters of that portion of the city, was held a valid exercise of the police power. And a similar ordinance in regard to livery stables was held valid in *City of Chicago* v. *Stratton,* 162 Ill. 494.

If it is claimed that there is a distinction between acts which aim to preserve the comfort rather than to protect the safety, health or morals of the public, and such a distinction seems to be vaguely suggested by the court, an answer has been given by the Supreme Court of the United States in *Lake Shore & M. S. Ry. Co.* v. *Ohio,* 173 U. S. 300, where Mr. JUSTICE HARLAN, speaking for the court, said: "The power of the state by appropriate legislation to provide for the public convenience stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals or the public safety." And the same doctrine was emphatically reaffirmed in *Chicago, B. & Q. Ry Co.* v. *Drainage Commissioners,* 200 U. S. 561, 592. E. R. S.